REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 13 OF 2017

ABDIRAHMAN YARROW GAB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 1183 of 2014 – Ole Tanchu- SRM)

JUDGMENT

The appellant was charged in the Chief Magistrate's court at Garissa with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 15th April 2014 at Bulla County in Garissa Township within Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of KA a girl aged 15 years.

In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place unlawfully and intentionally committed indecent act by rubbing the vagina of KA a child aged fifteen (15) years with his penis.

He denied both counts. After a full trial, he was convicted of the main count of defilement and sentenced to serve 20 years imprisonment.

He has now come to this court on appeal through counsel on the following grounds:

1. That the trial court erred in law by not complying with the provisions of Section 200 of the Criminal Procedure Code (Cap.75).

2. That the trial magistrate erred in law and fact by failing to invoke Section 8(5) (a) and (b) of the Sexual Offences Act 2006.

3. That the trial magistrate erred in law and fact by failing to make an adverse inference on the prosecution's case for failing to call crucial witnesses.

4. That the trial magistrate erred in law by failing to comply with the mandatory provisions of Section 211 of the Criminal Procedure Code.

5. That the trial magistrate erred in law and in fact in failing to find that the age of the complainant was not proved beyond reasonable doubt.

6. That the trial court erred in law and fact by making a finding that the evidence of defence witness 2 required corroboration.

7. That the trial court erred in law and fact by making a presumption that the appellant was an adult at the time of the alleged offence while the appellant had testified he was a minor.

8. That the trial magistrate erred in law and in fact by failing to find that the totality of the defence evidence impeached the prosecution case.

9. That the trial magistrate erred in law and in fact by failing to caution himself that all prosecution witnesses had a reason to falsely accuse the appellant.

10. That the trial magistrate erred in law and in fact by failing to find that the evidence of prosecution witnesses was not credible and had been impeached by the defence.

11. That the trial magistrate erred in law and in fact by finding that the appellant was lying by saying that he was not sure whether the complainant was married or divorced during the period when they were together.

During the hearing of the appeal, Learned Counsel for the appellant Mr. Nyaga made extensive oral submissions. Counsel relied on the case of **Duncan Mwai Gichuhi –vs- Republic (2015) eKLR** a High Court Criminal Appeal at Nyeri and the case of Martin Charo –vs- Republic (2016)eKLR a High Court Criminal Appeal heard at Malindi.

Learned Principal Prosecuting Counsel Mr. Okemwa conceded to the appeal.

This is a first appeal. As a first appellate court, I am required to evaluate the evidence on record afresh and come to my own conclusions and inferences. In doing so, I am required to bear in mind that I did not see witnesses testify to determine their demeanor, and give due allowance for that fact. See the case of **Okeno –vs- Republic (1972) EA 32.**

I have perused the proceedings and judgment and re-evaluated the evidence on record. This is a case where the appellant took the complainant from her home at Bulla Iftin on a vehicle in the presence of relatives and lived with her continuously for two months at Bulla County, both in Garissa Township. After two months living as husband and wife, the complainant went back home. Both the appellant and complainant agreed in evidence that they lived together for that period and indulged in sexual intercourse a number of times.

The case was initially heard by Hon. B. J Ndeda (SPM) who heard all the prosecution witnesses up to 15/4/2015. Between 4/6/2015 and 23/9/2015 the case was mentioned before V. Asiyo (RM) and S. Jalango (SRM). The appellant was represented by Counsel Mr. Onono and on 23/9/15 Mr. Onono informed the court that the defence wished to proceed from where the case had reached. The court then recorded as follows:

“Court having complied with provisions of Section 200 Criminal Procedure Code, matter to proceed from where it has reached.”

It is a ground of appeal that Section 200 of the Criminal Procedure Code was not complied with. I am aware that the Section is couched in mandatory terms. The section requires that the provisions of the section be explained to the accused himself not his lawyer, and he is required to make his choice whether to proceed from where the case has reached or request the recall of witnesses who have already testified.

In my view, though the section is mandatory, it is the duty of counsel who appears in court to represent his client ably. On appeal, another lawyer has come on record. It is not right for a competent lawyer to highjack the accused’s rights at the trial and then conveniently disappear on appeal.

In my view, from the record of the trial court that section was complied. In the circumstance of the case what was recorded by the trial court was sufficient for compliance with Section 200 of the Criminal Procedure Code. I dismiss that ground.

It is also a ground of appeal that Section 211(Cap.75) of the Criminal Procedure Code was not complied with. This section requires that the trial court explains to the accused the three options available to him or her in his defence.

Again Mr. Onono who appeared for the appellant said that the accused would give sworn evidence and call a witness. This is exactly what happened before Hon. Ole Tanchu (SRM). Again, in my view no prejudice was caused to the accused in his defence. He was ably represented as the record shows. In my view, the section was sufficiently complied with and that ground for appeal will not succeed.

Section 8 (5) of the Sexual Offences Act provides a defence to the offence defilement. It states as follows:-

> **"8(5) It is a defence to a charge under this section if;**
>
> **a) it is proved that such child, deceived the accused person in believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
>
> **b) the accused reasonably believed that the child was over the age of eighteen years."**

From the evidence on record, the appellant visited the complainant at her home a number of times. The mother and sisters (PW4 M A and PW5 H H were at times present and did not raise a complaint. He went in a motor vehicle (matatu) and in the presence of a young brother of the complainant took her to his place and lived with her for two months in the same Township of Garissa without any record of a report made by relatives of the complainant to the police, elders, chief or headman.

The criminal case was brought against the appellant only after he abandoned the complainant after impregnating her. In my view, the conduct of the complainant and her parents or relatives made the appellant reasonably believe that the complainant was above 18 years of age. The law does not require that a person should ask for a birth certificate before engaging in sexual activity with another. Each case has to be considered on its own facts. In this case, I am convinced that the defence under Section 8 (5) of the Sexual Offences Act was available to the appellant who raised it at the trial. In this regard, I am fully in agreement with the reasoning in the case of **Duncan Mwai Gichuhi –vs- Republic (2015) eKLR**. The Learned Magistrate should thus not have convicted him for the offence. On that reason, I will allow the appeal.

The appellant has stated on appeal that he was 17 years of age when the alleged offence was committed. That allegation in my view was an afterthought. He could not have owned a motor vehicle if he was not an adult. He could also not be driving it on commercial basis if he did not have a driving license. As he said, he was the breadwinner of his family through driving that motor vehicle. I dismiss that ground.

For the above reasons, I allow the appeal, quash the conviction, and set aside the sentence. I order the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa on 16th November, 2017.

GEORGE DULU

JUDGE